83-596 NO. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SIDNEY GLASER, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey,

Cross Petitioner,

v.

JOHN SALORIO, ROBERT COE and JOHN D. McGARR, JR.,

Cross Respondents.

On Cross Petition for a Writ of Certiorari to the Supreme Court of New Jersey

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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Questions Presented

1. Can two states enter into an agreement to coordinate their laws relating to the taxation of individuals who work in one of the states and reside in the other without securing congressional approval pursuant to the Compact Clause of the United States Constitution (Art. I, §10, Cl. 3)?

2. Is the objective of the Privileges and Immunities Clause of Article IV of the United States Constitution of maintaining harmonious interstate relations satisfied by the 1962 agreement between the States of New York and New Jersey which establishes a system for coordinating the tax laws of the two states by which tax revenues from individuals who reside in one state and earn their income in the other are equitably apportioned and the imposition of double taxation avoided?

3. When viewed as part of New Jersey's entire taxing scheme and the benefits received by New York commuters, does the New Jersey emergency transportation tax, consistently with the Privileges and Immunities Clause of Article IV of the United States Constitution, fairly apportion to New York commuters the costs incurred by New Jersey in the construction, maintenance and operation of interstate transportation facilities servicing that group?

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The cross petitioner, Director of the Division of Taxation, Department of the Treasury of the State of New Jersey, respectfully prays that a writ of certiorari issue to review the opinions and orders of the Supreme Court of New Jersey entered on June 8, 1983 and March 26, 1980.

Opinions Below

The opinion of the Supreme Court of New Jersey has been officially reported at 93 N.J. 447, —— A.2d —— (1983), and also is reproduced in Appendix A to the cross respondents' petition for certiorari in this matter (*Salorio* v. *Glaser,* United States Supreme Court Docket No. 83-353). The opinion of the Superior Court of New Jersey, Chancery Division, which is not officially reported, has been reproduced in Appendix B to the petition for certiorari.

The 1980 opinion of the Supreme Court of New Jersey is officially reported at 82 N.J. 482, 414 A.2d 943 (1980), and has been reproduced in Appendix A to this cross-petition for certiorari. The prior opinion of the Superior Court of New Jersey, Chancery Division, which is not officially reported, has been reproduced in Appendix B to this cross-petition for certiorari.

Jurisdiction

The judgment of the Supreme Court of New Jersey which is the subject of this cross petition was entered on June 8, 1983. It followed a remand ensuing from an earlier opinion of the court dated March 26, 1980. The petition for certiorari was received on September 6, 1983, and this cross petition is filed within 30 days of that date, pursuant to Rule 19.5, Rules of the Supreme Court of the United States.

The cross petition invokes the jurisdiction of the Court pursuant to 28 U.S.C. §1257(3). In arguing that the tax is consistent with the Privileges and Immunities Clause

of Article IV, because it is imposed and collected pursuant to an agreement between the States of New York and New Jersey (Points II and III) and in arguing that other taxes which New Jersey residents pay should be taken into account in determining the validity of the ETT (Point IV), the cross petitioner is petitioning from the earlier opinion of the Supreme Court of New Jersey. The earlier opinion of the New Jersey court was a final decision on these issues, but did not terminate the litigation. The cross petitioner, in its initial cross petition for a writ of certiorari to this Court from the earlier decision of the Supreme Court of New Jersey (Supreme Court Docket No. 80-123), raised the issue of the agreement between the States of New York and New Jersey. The Court's denial of the cross petition in the earlier proceeding (449 U.S. 874 (1980)) does not imply a rejection of the State's position on the merits. *Hughes Tool Co.* v. *Trans World Airlines,* 409 U.S. 363, 365 n. (1973), reh. den. 410 U.S. 975; *Maryland* v. *Baltimore Radio Show,* 338 U.S. 912, 919 (1950).

Statutory and Constitutional Provisions Involved

New Jersey Emergency Transportation Tax Act, N.J. S.A. 54:8A-1 to 57.

Reported in Appendix D to the cross respondents' petition for certiorari.

United States Constitution, Art. IV, §2, cl. 1

> The Citizens of each State shall be entiled to all Privileges and Immunities of Citizens in the several States.

United States Constitution, Art. I, §10, cl. 3.

> No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . .

Statement of the Case

The New Jersey tax structure relies very heavily upon property taxes, which are among the highest in the nation (Pa 33).* Since real property taxes for the most part are paid only by residents, nonresidents who commute to New Jersey traditionally have not contributed materially to State revenues even though they derive substantial benefits from the New Jersey transportation system and from other State services. One of the public services which has placed heavy stress upon the fiscal resources of the State has been the transportation of interstate commuters. *See, e.g., In re Central R.R.*, 485 F.2d 208 (3rd Cir. 1973) (en banc) *cert.* den. *sub nom. Timpany* v. *New Jersey*, 414 U.S. 1131 (1974).

In 1961, following extensive studies and hearings on the transportation problem in the North Jersey-New York metropolitan area, (see Appendix A at 9 to 10), New Jersey enacted the Emergency Transportation Tax Act. N.J.S.A. 54:8A-1 et seq. The ETT is an income tax on individuals who use interstate transportation facilities. The imposition of the tax is expressly contingent upon an annual certification by the New Jersey Commissioner of Transportation to the State Treasurer of the existence of a "critical transportation problem" between New Jersey and a bordering state. N.J.S.A. 54:8A-5(c). The extent of the transportation problem existing in the New York-New Jersey metropolitan area was fully documented by the cross petitioner's experts in the second trial court proceeding. Over seven million people travel from home to work every weekday in this area, 2,250,000 of these in northern New Jersey (Pa 273). The transportation problem is aggravated by the extraordinarily high density of the points

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* The reference is to the cross respondents' appendix in the Supreme Court of New Jersey.

of origin and destination and by the limited number of river crossings between the two States (Da 2 to Da 10* and see App. B to cross respondents' petition for certiorari at 32-3). ETT revenues are used exclusively to finance projects designed to alleviate the transportation problems in this area. N.J.S.A. 54:8A-20(b)(2) and see App. A at 15. When enacted, the ETT in effect applied only to New Jersey residents commuting to work in New York. App. A at 12. While the ETT was imposed upon individuals residing in either New York or New Jersey and deriving income in the other state (N.J.S.A. 54:8A-2), the Act allowed a credit to nonresidents for taxes paid to another jurisdiction if the jurisdiction allowed a similar credit to New Jersey residents. N.J.S.A. 54:8A-16(A). The New York personal income tax, which was imposed at the same rate as the ETT, provided for a similar nonresident credit (1960 N.Y. Sess. Laws, Ch. 563, New York Tax Law §640 (McKinney) (repealed)) so that New Jersey residents commuting to New York were allowed a credit against their New York tax liability for the ETT.

Apparently dissatisfied with the loss of revenue resulting from the nonresident credit contained in its personal income tax law, New York repealed the nonresident credit provision and amended the credit allowed to New York residents. 1962 N.Y. Sess. Laws, Ch. 2, approved January 15, 1962. Since allowance of the nonresident credit in the ETT is contingent upon reciprocal treatment of New Jersey residents, the repeal of the New York nonresident credit had the effect of subjecting New York residents to the ETT. The net result was to render New Jersey residents liable for both the New York personal income tax and the ETT on their income derived from New York and

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* The reference is to the cross petitioner's appendix in the Supreme Court of New Jersey.

to render New York residents liable for only the ETT on their income derived from New Jersey.

Discussions between New Jersey and New York to resolve the tax controversy eventually culminiated in an agreement or accord between the two States Appendix C. The heart of the Accord was that by means of reciprocal legislation, each State would tax residents of the other while granting their own residents a credit for taxes paid to the other State. Appendix C at 61, 62, 66-67.

The terms of the Accord between the States were announced by Governors Rockefeller and Hughes on May 6, 1962 in the following Executive Statement:

> Governor Richard J. Hughes of New Jersey and Governor Nelson A. Rockefeller of New York announced today that they had reached an understanding in regard to the administration and enforcement of the personal income tax laws of their respective States as they affect residents of the other State.
>
> Governor Rockefeller announced that New York, under legislation enacted at the 1962 legislative session, will allow its residents a credit against their New York State personal income taxes for income taxes paid to New Jersey under the New Jersey Emergency Transportation Act enacted in 1961, as amended.
>
> Governor Hughes announced that he would submit to the New Jersey Legislature on Monday legislation which will grant to New Jersey residents a credit against the New Jersey Emergency Transportation Tax for income taxes paid to the State of New York under New York's personal income tax law, as amended in 1962.

> In addition, it was agreed that neither State would contest nor participate in contesting the right of the other to levy and collect taxes imposed by the two laws on residents of the other; and that each State would assist and cooperate with the other in the administration and enforcement thereof so as to assure to the citizens of each who are directly involved the greatest degree of certainty as to their responsibilities under the two laws.
>
> The Governors expressed the belief that this agreement will clarify for the New York and New Jersey commuters their status in regard to the income tax laws of the two States and will insure certainty in the application and administration of such laws.
>
> The Governors stated that they are taking this action in the interest of promoting interstate cooperation and pledged their continued cooperation in other matters affecting their citizens who live in one state and work in the other. Noting the progress that has been made recently in such matters as the Hudson and Manhattan Railroad, the World Trade Center, and the program for an integrated regional transportation network, the Governors expressed their confidence of still further progress through similar joint action, conducted in a spirit of harmony, cooperation and good will [App. C at 66 to 67].

Following this executive action, the New Jersey Legislature enacted Chapter 70 of the Laws of 1962, which was made expressly retroactive to all taxable years beginning on or after January 1, 1961. This provision affords a credit to New Jersey residents against the ETT for any income tax imposed by another "critical area State" (*i.e.*, New York). N.J.S.A. 54:8A-16(B). Thus, due to the retroactive

amendment of the New York Personal Income Tax Law repealing the nonresident credit and the subsequent amendment of the ETT granting a credit to New Jersey residents for taxes paid to New York, the ETT is now paid by New York residents working in New Jersey.

The reciprocal crediting provisions in the ETT Act and the New York Personal Income Tax Law remain in effect today. Neither State has taken action to rescind the 1962 Accord. New York, however, despite its undertaking in the Accord not to contest or participate in contesting New Jersey's right to levy the ETT, in 1977 sought leave to file a complaint in this Court against New Jersey alleging that the ETT violated the Privileges and Immunities Clause. Citing *Pennsylvania* v. *New Jersey*, 426 U.S. 660 (1976), the Court denied New York's motion.* *New York* v. *New Jersey*, 429 U.S. 810 (1976). The Court, however did not reach the effect of the 1962 Accord.

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* In *Pennsylvania* v. *New Jersey*, 426 U.S. 660 (1976), the Court had held in a brief *per curiam* opinion that Pennsylvania could not maintain an original action against New Jersey to contest the validity of the transportation benefits tax (N.J.S.A. 54:8A-58 *et seq.*), a tax similar in material respects to the ETT, which New Jersey imposed upon Pennsylvania residents commuting to New Jersey. Any harm to Pennsylvania's fisc could be remedied by the elimination of the credit which Pennsylvania granted to its residents for payments of the transportation benefits tax, and the suit was not maintainable by Pennsylvania as *parens patriae* because Pennsylvania was asserting a collectivity of private suits and no sovereign state interest was implicated.

Shortly after the enactment of the New Jersey gross income tax (N.J.S.A. 54A:1-1 *et seq.*), New Jersey and Pennsylvania entered into a reciprocal personal income tax agreement. Under the agreement, each State taxes its own residents who are employed in the other but does not tax residents of the other State employed within the taxing State. The agreement is currently in force and is not, so far as the State of New Jersey is aware, being challenged in any court.

Following New York's unsuccessful attempt—in violation of the Accord—to challenge the ETT by an original action against New Jersey, three individual New York commuters commenced this lawsuit in 1977 in the Superior Court of New Jersey. They sought a declaration that the ETT was unconstitutional, a final injunction against further withholding, a declaration that they need not file further ETT returns or pay further ETT, and a refund of "all monies withheld or paid under the Commuter Tax to date" (Pa 2).

Following certain procedural motions, cross motions for summary judgment and extensive depositions, on October 24, 1978, the trial court issued a comprehensive opinion upholding the constitutionality of the ETT. Appendix B at 53 to 56. The court found that there was indeed a transportation crisis in northern New Jersey, that the "impact of the tax upon residents and non-residents bears a close relation to the challenge of correcting the traffic and commuting problems" (Appendix B at 54), and concluded that the ETT did not violate the Privileges and Immunities Clause or the Equal Protection Clause of the United States Constitution. The court also found that New York and New Jersey had entered into a reciprocal agreement, consistent with the principles of interstate comity embodied in the Privileges and Immunities Clause of Article IV, pursuant to which the ETT and its companion legislation in New York had been enacted and remained in effect. In finding the existence of such a mutual undertaking between the States the trial court stated:

> In the 1962 Act and thereafter, these two sovereign states by compact, by arrangement, by agreement, by attitude and by legislation set up an arrangement whereby they agreed on a taxing method which would govern commuters. New York accepted

> the 1961 legislation and what developed later. It arranged for certain credits to be given residents of both New York and New Jersey. New York saw to it that its residents did not pay anything extra by virtue of their working in New Jersey. New Jersey took the same attitude.
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> • • •
>
> . . . [T]here is no question in this Court's mind that the 1962 accord between the two states and the actions and inactions of the parties thereafter through 1975 represented a reciprocal understanding, compact or the like between the legislative and executive branches of these two states . . . [App B at 55].

On appeal to the Supreme Court of New Jersey, that court, as an initial matter, ruled that the cross respondents had standing and that New York State was not the real party in interest in the law suit. The court went on to uphold the ETT as consistent with the Equal Protection Clause, but, concluding that the record before it was insufficient to determine whether or not the ETT violated the Privileges and Immunities Clause, remanded the case to the trial court. Responding to the cross-petitioner's argument that New Jersey residents pay substantial other taxes which should be taken into account in determining the constitutionality of the ETT under the Privileges and Immunities Clause, the court prohibited the inclusion of any tax in the comparison "unless its scope is restricted to collections for transportation services, the asserted ground of justification for the ETT" (Appendix A at 25). The Supreme Court of New Jersey further held that the 1962 Accord between the States of New York and New Jersey was not an enforceable agreement. In the court's view, if if the Accord were interpreted to "bind New York's

power over the extension of tax credits to its residents," (Appendix A at 30), New York would be relinquishing a portion of its sovereign power. Under its reading of the rule of *United States Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452 (1978), such an agreement would require the consent of Congress.

While the remand order of the New Jersey Supreme Court was clearly not a final judgment from which a party may appeal pursuant to 28 U.S.C. §1257 (*see Marketstreet Railway Company* v. *Railroad Commission of State of California,* 324 U.S. 548, 551 (1945) and *Cox Broadcasting Corporation* v. *Cohn,* 420 U.S. 469, 477 (1975)), cross respondents nevertheless sought review of that order in this Court. Cross petitioner moved to dismiss and simultaneously cross-petitioned for a writ of certiorari on the ground that the portion of the New Jersey Supreme Court's opinion which concluded that the Accord between the States of New York and New Jersey was unenforceable was incorrect under this Court's decision in *United States Steel Corp.* v. *Multistate Tax Commission, supra.* Cross petitioner further urged that the Accord was consistent with the goals of the Privileges and Immunities Clause because it provided for a system of coordinating the tax laws of the two States respecting interstate commuters and avoided double taxation of those commuters. On October 6, 1980, this Court dismissed cross respondents' appeal for want of jurisdiction (449 U.S. 804) and on the same date denied the State's cross petition for certiorari. 449 U.S. 874.

On remand, cross petitioner, with the assistance of experts in the transportation field, developed extensive evidence on the exact nature of the transportation problem, the extent to which New York commuters contribute to

it, the benefits they derive from New Jersey's expenditures for transportation facilities, and net ETT collections over the twenty-year history of the tax. Cross respondents produced experts' opinions themselves, purporting to refute the State's evidence. In May, 1981 the remand hearing mandated by the New Jersey Supreme Court was held before the trial court. After hearing, the trial court concluded that in light of the New York commuters' contribution to the interstate transportation problem, the costs imposed by New York commuters on the State's transportation facilities, and the transportation benefits they received from ETT expenditures, the ETT did not offend the Privileges and Immunities Clause. Indeed, the trial court concluded that $182.9 million of State transportation expenditures were properly allocable to the New York commuters over the twenty-year history of the ETT Appendix B to cross respondents' petition for certiorari at 36. Moreover, the trial court concluded that these substantial expenditures by the State on behalf of New York commuters produced benefits beyond the mathematical dollar value of the expenditures. Those benefits consist in savings in time and user costs attributable primarily to new highway construction and widening, highway resurfacing, operational improvements, safety improvements, maintenance and drainage, and, in the transit area, savings in time and costs.

Cross respondents again moved for direct certification to the Supreme Court of New Jersey, and on June 8, 1983 that court, reversing the trial court, concluded that the ETT violated the Privileges and Immunities Clause because the burden of the ETT on New York residents was not substantially related to the burden which those residents placed upon New Jersey's transportation facilities. Appendix A to cross respondents' petition for certiorari at 14. Of net ETT collections amounting to approxi-

mately $381 million over the history of the tax, approximately $182 million of costs incurred by the State for transportation facilities were, in the court's view, properly allocable to the New York commuters, an amount slightly less than 50% of the total tax. *Ibid.* While the State's expenditures on behalf of New Yorkers were substantial, it was the court's conclusion that the costs incurred were of a sufficient level of disproportion to total collections (a ratio of roughly 2 to 1) so as to offend the Privileges and Immunities Clause. The court's analysis was restricted to a comparison of the ETT assessment against transportation costs caused by New Yorkers. The court in its earlier opinion had refused to include within the analysis other factors, such as the overall tax burden on New Jersey residents as compared to the ETT burden on New York commuters, or the costs of the entirety of governmental services made available to New Yorkers as contrasted with transportation services only. App. A at 25. While granting cross respondents the declaratory relief which they sought, the court, citing *Lemon* v. *Kurtzman* (*Lemon II*), 411 U.S. 192 (1973), granted prospective relief only, denying refunds of ETT and ruling that its decision would take effect with respect to income earned on or after January 1, 1984.*

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*A complete statement regarding the portion of the New Jersey court's opinion dealing with the remedy afforded the cross respondents is contained in the cross petitioner's brief in opposition to the petition for certiorari in this action. However, for present purposes, suffice it to say that the individual New York commuter is not affected one wit by the New Jersey Supreme Court's decision. Because of the credit mechanisms involved, taxes not paid to New Jersey by such taxpayers must be paid to New York State.

While detailing no individualized harm to themselves by reason of the decision of the Supreme Court of New Jersey, cross respondents nevertheless have petitioned this Court for a writ of certiorari to review that portion of the lower court's judgment denying them recovery of ETT paid. As a basis for granting the writ they allege that the principle of *stare decisis* is threatened by the ruling of the New Jersey court.

REASONS FOR GRANTING THE CROSS PETITION

POINT I

If the Court grants the writ of certiorari to consider the claim of the petitioners-cross respondents that the prospective nature of the judgment below undermines the principle of *stare decisis*, it should grant the cross petition in order to be able to review the entire case.

As indicated in the State's brief in opposition to the petition for certiorari, it is the position of the cross petitioner that the judgment of the Supreme Court of New Jersey below does not undermine the principle of *stare decisis* but rather is fully consistent with the principles laid down in *Lemon* v. *Kurtzman, supra,* and the application of federal equitable remedies. Furthermore, cross respondents' abstract concern for the principle of *stare decisis* is not a sufficient ground for invoking this Court's jurisdiction when cross respondents assert no individualized constitutional (or indeed practical) harm. However, in the event the Court determines that the prospective nature of the judgment below is inconsistent with the principles of *Lemon* v. *Kurtzman* and concludes further that cross respondents' concern over the principle of *stare decisis* presents a substantial constitutional question, it is imperative that the

Court consider the entire case rather than solely the issues raised by the petition for certiorari. The petition questions only the appropriateness of the remedy adopted by the Supreme Court of New Jersey, but the appropriateness of the remedy is an issue only if the lower court was correct in invalidating the ETT. Thus, before reaching the question of the relief afforded by the lower court, the Court should determine whether that question is even present in the case by considering the substantive validity of the tax. In order to determine the validity of the tax, the Court must resolve the issues presented in the cross petition, including the enforceability and effect of the 1962 Accord between New York and New Jersey.

It would require no further expenditure of this Court's resources to consider the cross petition in the event the petition is granted. The record and case authority upon which the cross petitioner would rely in urging the validity of the ETT are fully developed in the existing record. The record documents the 1962 Accord establishing that the States of New Jersey and New York entered into an agreement in order to resolve a controversey between them relating to the taxation of interstate commuters and that the Accord results in no economic harm to those commuters. The record further shows that in the context of New Jersey's entire taxing scheme, the ETT is consistent with the Privileges and Immunities Clause because New York commuters do not pay more than their fair share of New Jersey taxes. There is no inequity in the taxes paid by nonresidents under the ETT compared with the overall taxes paid by New Jersey residents; nor is there inequity in terms of a comparison of total services provided (not just transportation services) and the total tax imposed.

In short, it is the position of the State that there is ample credible evidence in the record to support the conclusion that the ETT is consistent with the Privileges and Immunities Clause of Article IV.

POINT II

The decision of the Supreme Court of New Jersey, that the 1962 Agreement between New York and New Jersey is unenforceable against the cross respondents because it did not receive congressional approval pursuant to Article I, §10, Cl. 3 of the United States Constitution, is irreconcilable with the Court's decision in *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978).

As an initial point, it is clear, and the trial court in its initial opinion so held, that there was in fact an agreement between the States of New York and New Jersey respecting their mutual taxation of interstate commuters. The trial court stated:

> In the 1962 Act and thereafter, these two sovereign states by compact, by arrangement, by agreement, by attitude and by legislation set up an arrangement whereby they agreed on a taxing method which would govern commuters. . . .
>
> [T]here is no question in this Court's mind that the 1962 accord between the two states and the actions and inactions of the parties thereafter through 1975 represented a reciprocal understanding, compact or the like between the legislative and executive branches of these two states [Appendix B at 55].

There is substantial evidence in the record to support these findings of the State trial court. Thus, the joint statement of Governors Hughes and Rockefeller commences:

> Governor Richard J. Hughes of New Jersey and Governor Nelson A. Rockefeller of New York have

> announced that the Executive Departments of their respective States have reached *an understanding* in regard to the operation and administration of the income tax laws of the two states.
>
> The Governors declared that *it has been agreed that* [there follows a list of undertakings by the State of New York and the State of New Jersey.] [App. C at 61; emphasis supplied].

In *United States Steel Corp.* v. *Multistate Tax Commission, supra,* the Court squarely held that reciprocal legislation between two or more States providing for the apportionment or allocation of taxes payable by taxpayers with multistate contacts may be validly enacted without the consent of Congress pursuant to the Compact Clause of the United States Constitution (Art. I, §10, cl. 3). The compact which was upheld was remarkably similar in subject matter and purposes to the Accord at issue here. Both agreements seek interstate coordination of tax policy respecting taxpayers with ties to more than one State, in the interests of equity and convenience. Specifically, the four stated purposes of the Multistate Tax Compact are equally applicable to the 1962 Accord: equitable apportionment, uniformity in state tax systems, convenience, and the avoidance of duplicative tax liability. *Id.* at 456.

The Court in *United States Steel Corp.* v. *Multistate Tax Commission* reiterated the established doctrine that the strictures of the Compact Clause apply only to those interstate agreements that transfer state sovereignty "in a way that encroaches upon the supremacy of the United States." *Id.* at 472. The Court found that an agreement by which the States seek to coordinate the operation of their tax laws with respect to taxpayers with multistate contacts does not in any way enroach upon the sovereignty

of the United States and therefore does not require congressional approval. In light of the close similarities in purposes and effect between the compact upheld in *United States Steel Corp.* v. *Multistate Tax Commission, supra*, and the 1962 Accord between New York and New Jersey, the Supreme Court of New Jersey should have recognized in its initial opinion in this case that the 1962 Accord could be fully effective without congressional approval.

The court, however, held that the 1962 Accord was unenforceable without the consent of Congress because, "if the 1962 Accord were interpreted to bind New York's power over the extension of tax credit [sic] to its residents, it would involve an impermissible relinquishment of that state's sovereign power . . ." (App. A at 30). In the court's view this was an impermissible result under the rule of *United States Steel Corp.* v. *Multistate Tax Tax Commission* absent the approval of Congress.

However, in holding that because ". . . no [congressional] approval was given, the Accord cannot be relied on by the State here as an enforceable agreement", the court confused the question whether New York is free to withdraw from the 1962 agreement (which it has never done) with the question whether the agreement is binding upon taxpayers such as the cross respondents so long as it remains in effect. The power of New York to withdraw from the 1962 Accord is not in issue in this case. (As noted, New York has continued to make credits available pursuant to the Accord.)

Rather, the question is whether the agreement is binding upon taxpayers so long as it remains in effect. And on this latter question, the Court in *United States Steel Corp.* v. *Multistate Tax Commission* squarely held that two or more states may enter into an agreement relat-

ing to the apportionment of tax revenues which would be binding upon taxpayers without securing congressional approval. See also, *Bode* v. *Barrett*, 344 U.S. 583, 586 (1953) (Illinois highway use tax exemption for nonresidents does not require congressional approval where the states of the nonresidents reciprocally grant similar tax exemptions to citizens of Illinois). Therefore, the Supreme Court of New Jersey was simply wrong in concluding that the 1962 Accord is unenforceable against the cross respondents because not enacted in conformity with the Compact Clause.

POINT III

The Emergency Transportation Tax is consistent with the principles of federalism which the Privileges and Immunities Clause of Article IV is designed to serve, because it is imposed and collected pursuant to a 1962 Agreement between the States of New York and New Jersey which provides for the coordination of the tax laws of the two states by equitably apportioning tax revenues from individuals who reside in one State and earn their income in the other.*

A reciprocal arrangement between two States to fairly allocate the financial burdens of government between citizens who reside in one State and work in the other, *with-*

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* While the trial court in its initial opinion of October 24, 1978 concluded that the 1962 Accord between the States of New Jersey and New York satisfied the obligations of the Privileges and Immunities Clause (App. B at 55 to 56), the Supreme Court of New Jersey did not reach this issue in its first opinion because it ruled that the 1962 Accord was unenforceable under the Compact

(Footnote continued on following page)

out imposing any additional overall tax burden on an individual simply because he chooses to work outside the State where he resides, is fully consistent with the objectives sought to be achieved by the Privileges and Immunities Clause of Article IV. This provision, ". . . which 'appears in the so-called States' Relations Article, the same Article that embraces the Full Faith and Credit Clause, the Extradition Clause . . . the provisions for the admission of new States, the Territory and Property

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(Footnote continued from preceding page)

Clause. App. A at 30 to 31. However, while the court held in its second opinion that the ETT, standing alone, is inconsistent with the Privileges and Immunities Clause, it strongly implied that had it not in its earlier opinion "questioned the validity of the accord under the Compact Clause" (App. to cross respondents' petition for certiorari at 18), it would have sustained the ETT as based on an agreement granting reciprocally favorable treatment to nonresidents. *Ibid.* Thus, the issue of the effect of the 1962 Accord on the validity of the ETT was passed upon by the court below and should be considered by this Court. In any event, the failure of a court below to explicitly rule on an issue does not raise a question of the Court's jurisdiction. If, as is the case here, the issue is significant and has been fully briefed and argued by the parties, the Court may reach the issue. *See Blonder-Tongue Labs* v. *University Foundation*, 402 U.S. 313, 320 n.6 (1971). Cross petitioner's position is that the Privileges and Immunities Clause is directed to unilateral discrimination by one State against the citizens of another, not to a mutual undertaking by two sovereigns to fairly and equitably apportion taxes as between themselves without disadvantaging citizens of either state. Thus, the Court in *Austin* itself notes:

> Neither *Travis* nor the present case should be taken in any way to denigrate the value of reciprocity in such matters. The evil at which they are aimed is the unilateral imposition of a disadvantage upon nonresidents, not reciprocally favorable treatment of nonresidents by States that coordinate their tax laws [420 U.S. at 668, n.12].

Clause, and the Guarantee Clause,' *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U.S. 371, 379 (1978), 'establishes a norm of comity' *Austin* v. *New Hampshire*, 420 U.S. 656, 660 (1975), that is to prevail among the States with respect to their treatment of each other's residents." *Hicklin* v. *Orbeck*, 437 U.S. 518, 523-524 (1978). The opinion of the Court in *Austin* v. *New Hampshire, supra*, reaffirmed the view that the primary purpose of this Clause was the maintenance of proper relations between sovereign States in a federal union:

> The Privileges and Immunities Clause, by making noncitizenship or nonresidence an improper basis for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism [420 U.S. at 662].

Therefore, while invalidating New Hampshire's unilateral action in imposing a tax on Maine residents—described in *Pennsylvania* v. *New Jersey, supra* at 662, as a "beggar-thy-neighbor tax"—the Court was careful to point out that the Privileges and Immunities Clause would not require the invalidation of a tax on nonresidents which was part of a reciprocal arrangement between the State of domicile and the State of employment:

> Neither Travis nor the present case should be taken in any way to denigrate the value of reciprocity in such matters. The evil at which they are aimed is the unilateral imposition of a disadvantage upon nonresidents, not reciprocally favorable treat-

> ment of nonresidents by States that coordinate their tax laws [420 U.S. at 667, n. 12].*

Therefore, it is clear that the Privileges and Immunities Clause of Article IV does not preclude sovereign States in the federal system, each acting in the interests of its own citizens, from entering into agreements which establish a fair system for the imposition of taxes upon citizens with multistate contacts.

The trial court found as a fact that the States of New York and New Jersey had entered into a reciprocal arrangement in 1962 regarding the taxation of individuals who reside in one of the States and work in the other. It

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*The cross respondents have argued previously that this quotation does not support the validity of the ETT because the ETT does not accord them "favorable treatment". This argument is fallacious for several reasons. First, it is strongly arguable that the agreement does assure individuals in cross respondents' situation more favorable tax treatment than they otherwise might receive. Since the State of New York may constitutionally subject cross respondents to tax on the full amount of their income wherever earned (*Lawrence* v. *State Tax Commission*, 286 U.S. 276, 280-281 (1932)) and it is not disputed that cross respondents may be taxed pursuant to the New Jersey Gross Income Tax Act to the full extent of their New Jersey income, cross respondents have an exposure to double taxation on their New Jersey income which the agreement between the states serves to avoid. Furthermore, if the avoidance of possible double taxation is not recognized as "favorable treatment", it is still clear that the ETT does not impose any disadvantage upon cross respondents but rather, at worst, simply has a neutral effect upon them, since the amount of taxes which they pay to New Jersey under the ETT is identical to what they otherwise would be required to pay New York. A reciprocal arrangement which has a neutral effect on the overall tax obligations of a nonresident who works in another state is fully consistent with the principle of federalism which the Privileges and Immunities Clause of Article IV was designed to serve.

found that "[t]here was in 1962 and there continued thereafter an arrangement between the States of New York and New Jersey, their governors and their legislators which accepted as valid the tax situation now being challenged" (App. B at 50); ". . . that the 1962 Accord between the two states and the actions and inactions of the parties thereafter through 1975 represented a reciprocal understanding, compact or the like between the legislative and executive branches of these two states" (App. B at 55); and that "[n]either governor has taken formal action to rescind the limited part of the accord not dependent on legislative action, nor have they even made a statement which would challenge the validity of the arrangement" (App. B at 56).

There is more than sufficient evidence in the record to support the trial court's findings. When New Jersey first enacted the Emergency Transportation Tax Act in 1961, the incidence of the tax fell exclusively upon New Jersey residents. New York was dissatisfied with the fiscal consequences of the reciprocal crediting provisions of the ETT and the New York personal income tax, so appropriate steps were initiated to reverse the incidence of the taxes of the respective States. The New York Legislature enacted chapter 2 of the Laws of 1962 by which it repealed the tax credit previously afforded nonresidents for taxes paid to their State of residence and at the same time extended a credit to its own residents for taxes paid to the State in which they worked. By chapter 70 of the Laws of 1962, the New Jersey Legislature enacted similar complementary amendments to the ETT. The practical effect of these legislative enactments by the two States was to change the interstate taxing system of New York and New Jersey from one in which each State imposed a tax on its own residents to one in which each State imposed a tax on the residents

of the other State who commuted to work in the taxing State.

This reciprocal action by the legislatures of the two States set the essential framework for the May 6, 1962 agreement between Governors Rockefeller and Hughes. Paragraph 2 of the Agreement is an announcement by Governor Rockefeller ". . . that New York, *under legislation enacted at the 1962 legislative session,* will allow its residents a credit against their New York State personal income taxes for income taxes paid to New Jersey under the New Jersey Emergency Transportation Tax Act enacted in 1961, as amended" (App. C at 66) (emphasis added). Similarly, paragraph 3 of the agreement announced the intent of Governor Hughes to submit to the New Jersey Legislature the bill which was enacted less than a month later as chapter 70. Complementary to those basic legislative provisions, the remaining paragraphs of the agreement set forth mutual agreements by the States not to participate in contesting the taxes imposed by the two laws and to assist and cooperate in the administration and enforcement of the two laws. Therefore, the 1962 Accord represented a solemn reciprocal undertaking between the legislative and executive branches of the respective states.

Furthermore, this agreement remains intact today. The New York Legislature has not sought to repeal the tax credit extended to its residents for taxes paid to New Jersey, and the New Jersey Legislature has adhered to New Jersey's essential obligation under the 1962 Accord by continuing in effect the credit afforded its residents for taxes paid to New York. Similarly, neither governor has taken formal action to rescind the limited part of the Accord not dependent on legislative action. Therefore, assuming that either State could unilaterally withdraw from the 1962

Accord, the plain fact is that neither State has attempted to do so.*

The cross respondents seek to circumvent the provisions of the 1962 Accord by arguing that this case involves individual rights which are beyond the power of the States to address by reciprocal executive and legislative action. However, the Privileges and Immunities Clause is found in Article IV of the Constitution dealing with relations among states. "The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States." *Toomer* v. *Witsell*, 334 U.S. 385, 395 (1948). The legal import of the 1962 Accord is not that a State in concert with another State may limit the constitutional rights of an individual. Rather, the Accord represents a practical solution by the legislatures and executives of New York and New Jersey to the problem of taxing individuals who work in one of the States and reside in the other, without increasing the total tax burden of the cross respondents or of any other commuters similarly situated. Therefore, if the Court grants the petition for certiorari, it also should grant the cross petition in

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* As noted, however, while New York has not attempted to withdraw from the Accord, it has breached it, first by seeking a judgment from this Court that the New Jersey taxing scheme was unconstitutional (*New York* v. *New Jersey*, 429 U.S. 810 (1976)) and then by encouraging and financing this lawsuit (see letter to cross respondent McGarr from New York budget director at Da 1) in violation of its undertaking not to contest nor participate in contesting New Jersey's right to levy the ETT. However, neither the enforceability of this provision in the 1962 Accord nor the appropriate remedies for its breach are issues in this litigation. The only issue here is the effect of this agreement on the individual taxpayer, so long as it remains in effect.

order to consider the effect of the 1962 Accord upon the ETT's conformity with the principles of federalism which the Privileges and Immunities Clause of Article IV was designed to serve.

POINT IV

When viewed as part of New Jersey's entire taxing scheme and in conjunction with the benefits derived by New York commuters, the Emergency Transportation Tax is consistent with the Privileges and Immunities Clause of Article IV because New Jersey residents pay substantial other state taxes which nonresidents do not pay.

In determining the constitutionality of States taxes imposed only upon nonresidents, the Court has made clear that the analysis must take into account the entire taxing scheme of a State. If, when all the taxes are taken into account, the burden on residents and nonresidents is approximately equal, an individual tax imposed only upon nonresidents is not infirm. In *Travelers' Insurance Company* v. *Connecticut,* 185 U.S. 364 (1901), a state property tax based upon the assessed value of shares of stock in domestic corporations was challenged under the Privileges and Immunities Clause on the ground that shares held by nonresidents were assessed at market value while shares held by residents were assessed at market value "less the proportionate value of all real estate held by the corporation on which it [had] already paid a tax." The Court upheld the tax. It found that nonresident shareholders effectively paid no local taxes while resident shareholders paid taxes to the municipalities in which they resided. The Court reasoned:

> It was believed that a resident in a city or town, enjoying all the benefits of local government, should be taxed for the expenses of that government upon all the property he possessed, whether that property consisted in part or in whole of shares of stock. On the other hand, the nonresident, enjoying little or none of the benefits of local government, was exempted from taxation on account of the expenses of such local government. *At the same time it was not right that he should escape all contribution to the support of the state* which created and protected the corporation and the property of all its stockholders, and so a tax was cast upon the nonresident stockholder for the expenses of the state [185 U.S. at 368; emphasis supplied].

See also, General American Tank Car v. *Day,* 270 U.S. 367 (1926) (State property tax on rolling stock owned by nonresident corporations held not violative of Commerce Clause or Equal Protection Clause because, while resident corporations did not pay the tax, residents paid local property taxes). In *Gregg Dyeing Co.* v. *Query,* 286 U.S. 472 (1932), the Court squarely faced the issue of whether a State tax must be nondiscriminatory in and of itself or whether other taxes may be taken into account in determining its constitutionality. The Court concluded that a State tax imposed upon the use or storage of gasoline brought into the State violated neither the Commerce Clause nor the Equal Protection Clause because in-state sales and the in-state use of gasoline by in-state producers were similarly taxed although under different taxing statutes. The Court stated:

> But appellants question the right to invoke other statutes to support the validity of the Act assailed. To stand the test of constitutionality, they say, the

> Act must be constitutional 'within its four corners,' that is, considered by itself. This argument is without merit. The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution. There is no demand in that Constitution that the State shall put its requirement in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the state's constitutional power [286 U.S. at 479-480].

Moreover, there is no requirement that a tax on nonresidents be duplicated by an identical tax on residents. A tax on nonresidents may be completely different in form and rate as long as the overall burden is approximately equal. *Interstate Busses Corp.* v. *Blodgett,* 276 U.S. 245 (1927) (state mileage tax on interstate buses held not violative of Commerce Clause when intrastate carriers paid a gross receipts tax); *Safeway Trails, Inc.* v. *Furman,* 41 N.J. 467, 490-491 (1964) appeal dism'd and *cert.* den. 379 U.S. 14 (1964).

Austin v. *New Hampshire, supra,* is consistent with the principle of taking into account the entire taxing scheme of the State. Reviewing all the New Hampshire taxes, the Court concluded that those paid by nonresidents nowhere near equalled those imposed upon nonresidents under the commuter tax. Thus, *Austin* does not deviate from the principles set forth in the cases just discussed. Rather, the State simply could not meet the test which those cases impose.

In contrast to *Austin,* it is clear in this case and the trial court so held, that residents of New Jersey pay sub-

stantial property taxes. Nonresident commuters do not ordinarily pay such taxes, and yet they benefit from the services and protections afforded by the local governments which are supported by the property tax (App. B at 54). There is ample evidence in the record to support the trial court's findings. In an affidavit filed in conjunction with the State's cross motion for summary judgment in the initial trial court proceeding (Pa 845 to Pa 850), the Director of the New Jersey Division of Taxation stated that during the 1976 fiscal year, the average New Jersey resident paid property taxes amounting to $446.48. The only state in which per capita property taxes were higher during that year was Alaska. The Director of the Division of Taxation further attested that during the 1977 calendar year the average New Jersey resident household paid total New Jersey taxes amounting to $2,605.65, while the average nonresident household paid total New Jersey taxes, including the ETT, amounting to $583.15. In short, when the whole scheme of taxation is taken into account, it is clear that New Jersey residents pay more than their fair share of the costs of government, including the costs of transportation services. The New Jersey Supreme Court did not take the State's entire taxing scheme nor the governmental services provided (in addition to transportation services) into account in analyzing the constitutionality of the ETT under the Privileges and Immunities Clause.

Moreover, even if the ETT were analyzed without consideration of the other taxes borne by New Jersey residents, the tax would still be consistent with the Privileges and Immunities Clause. As established by the State in the remand proceeding, the New Jersey highway system was in place by 1961, the year in which the ETT was enacted (App. B to cross respondents' petition for certiorari at 37). Since that time, State expenditures for highway facilities have been used primarily to widen

and maintain the existing roads in order to accomodate commuter demand (*Ibid.*). Thus, while New York commuters, through the ETT, have contributed to the ongoing support of the New Jersey highway system, they contributed virtually nothing to its initial construction. The capital costs to construct the system were borne by New Jersey residents alone.

The Court has sanctioned similar state imposed cost differentials between residents and nonresidents. In *Vlandis* v. *Kline*, 412 U.S. 441 (1973), the Court struck down on Due Process grounds a State statute which created, under certain facts, an irrebuttable presumption of nonresidency for purposes of determining tuition rates at the state university. However, the Court made clear that the State had a legitimate interest in establishing preferential tuition rates for its residents. 412 U.S. at 448 and 453. That legitimate interest was elaborated upon in the dissenting opinions. In view of the large costs incurred by the States in constructing and operating their state universities and the tax burden imposed on state residents to fund those costs, the States could constitutionally require nonresidents to pay higher tuitions than residents.

The position of the New York commuters in this case is similar. They are benefiting from a highway system constructed in large part through tax dollars paid by New Jersey residents. The ETT merely assesses the New York commuters for a small portion of the State's current transportation costs. Such an assessment, in view of the heavy costs borne by New Jersey residents in putting the highway and transit systems in place, is fully consistent with the Privileges and Immunities Clause.

In short, the New Jersey Supreme Court misinterpreted the holdings of this Court in prohibiting the State from

justifying the ETT on the basis of other taxes paid primarily by residents and the prior contributions made by New Jersey residents to the transportation infrastructure, as well as the transportation costs imposed by New York commuters on the State of New Jersey. Therefore, if the Court grants the petition for certiorari, it should also grant the cross petition.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the cross petition for a writ of certiorari should be granted.

Respectfully submitted,

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